

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Joseph E. Atkins,)	C.A. No. 3:96-2859-22
)	
Petitioner,)	
)	
v.)	ORDER
)	
Michael Moore, Commissioner, South)	
Carolina Department of Corrections;)	
Charles Condon, Attorney General, State of)	
South Carolina,)	
)	
Respondents.)	
_____)	

By order entered June 10, 1997, this court granted Respondents' Motion for Summary Judgment and established June 20, 1997, as the date upon which any motion to alter or amend judgment should be filed. Petitioner served a Motion to Alter or Amend the Judgment, pursuant to Rule 59(e), Fed. R. Civ. P., and accompanying memorandum of law on June 20. On June 25, 1997, Petitioner also filed a Supplemental Memorandum in support of the Motion to Alter or Amend Judgment. Respondents have elected not to file a response to Petitioner's motion.

Although Rule 59(e) does not set forth explicit standards by which a district court may grant such a motion, courts interpreting the Rule have recognized three distinct grounds for amending an earlier judgment: (1) to accommodate an intervening change in the controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. *Colison v. International Chem. Workers Union*, 34 F.3d

233, 236 (4th Cir. 1994). The court will apply the preceding standards to Petitioner's motion.

Petitioner's motion raises four separate issues. They include: (1) that the equitable doctrine of laches should not serve as a procedural bar to the court's consideration of Petitioner's Grounds 1, 2 and 3; (2) that Petitioner's Ground 4 is not procedurally barred and that state PCR Judge Bristow's findings of fact regarding the GBMI issue are wrong; (3) that Petitioner's Ground 22 regarding voir dire of the sentencing judge is not procedurally barred; and (4) that the court erred in exercising its discretion to handle this death penalty case on an expedited basis. Most of the preceding issues fail to raise new matter. Rather, Petitioner's arguments on issues (1) and (2) above merely reiterate those arguments advanced earlier and rejected in the June 10, 1997, order denying habeas corpus relief. To the extent that issues (1) and (2) simply retread familiar territory, those issues do not constitute matters cognizable under a Rule 59(e), Fed. R. Civ. P., motion. Accordingly, the court will only summarily cross-reference and address issues (1) and (2).

(1) Application of laches to bar consideration of Petitioner's Grounds 1, 2 and 3

This issue has been treated at length in the June 10, 1997, order, pages 29-34 and 44-62. The court confirms the findings and conclusions set forth there. Petitioner ignores the fact that a critical factor supporting application of laches here---prejudice to the State caused by death of Petitioner's 1970 counsel and his father---was absent in the other cases cited by Petitioner. Moreover, the fact that Judge Singletary or the 1970 prosecutor may have been available for the state PCR hearing is immaterial because the two witnesses who would have information pertinent to attorney/client relations (Mr. Lesesne and Petitioner's father) were

dead by the time of the PCR hearing. Finally, as with all the court's findings of procedural bar in the June 10, 1997, order, this court went on to fully analyze every claim on the merits, including Grounds 1, 2 and 3. Petitioner's claims were unpersuasive for the reasons set forth earlier.

(2) Ineffectiveness of counsel in failing to pursue GBMI (Ground 4)

This issue was treated at length in the court's June 10, 1997, order, pages 36-38, and 62-73. The court confirms the findings and conclusions there. Petitioner's pro se "Supplement [sic] Petition for Writ of Certiorari," filed on May 7, 1996, while Petitioner was already represented by appointed counsel, was a nullity under South Carolina law and therefore Ground 4 was never properly presented or ruled on by the state supreme court. Although the PCR judge heard conflicting testimony on the question of when 1988 counsel learned of the GBMI statute, he resolved the conflicts and credited the testimony of certain witnesses on that point. Petitioner cannot demonstrate an infirmity in the PCR proceeding that strips Judge Bristow's credibility findings of the presumption of correctness under (former) 28 U.S.C. § 2254(d).

(3) Voir dire of sentencing judge (Ground 22)

The court agrees with Petitioner that the June 10, 1997, order was in error in concluding Ground 22 was procedurally barred. It appears Petitioner raised this claim to the state supreme court in a Petition to Argue for Overruling or Modification of Precedent filed March 21, 1989. The court denied the petition on April 5, 1989.

Accordingly, the court vacates the second paragraph and first sentence of the third

paragraph in this court's discussion of Ground 22 on page 124 of the June 10, 1997, order. The court has previously concluded, however, that under numerous Fourth Circuit precedents the claim is without merit.

(4) Generalized objections to the court's expedited scheduling order

Petitioner complains that the court erred in establishing an expedited timetable for this litigation and in giving Petitioner only ten calendar days in which to file a motion to alter or amend, Rule 59(e). Petitioner erroneously contends that the court applied the AEDPA 180-day timetable. This complaint is without foundation.

First, as the court noted in its telephone conference on January 23, 1997, and its February 4, 1997, order, the court assumed in this litigation that AEDPA timetables and standards of review were not mandatory in this case, even though Petitioner's claim was not pending at the time of enactment of the AEDPA.¹ The court emphasized to counsel, however, that it would exercise its discretion to conclude this case promptly, and consistently with the policy objectives established in the AEDPA and Fourth Circuit Judicial Council Order No. 113. Notwithstanding the expedited timetable, Petitioner sought, and was granted, and extension of time to file his Memorandum in Opposition to Respondents' Motion for Summary Judgment. That was the single instance in which Petitioner sought leave to extend a deadline established under the scheduling order.

¹As the June 10, 1997, order observed the instant petition was filed over eight months after enactment of the AEDPA. Most of the reported AEDPA retroactivity cases have addressed the application of the AEDPA to pending cases, not post-enactment cases like the present one.

Petitioner contends that this court's decision to refrain from referring this case to a Magistrate Judge for a Report and Recommendation "deprived petitioner of the commonly-granted scrutiny of a magistrate's hearing, report and recommendations, and an opportunity to argue objections to those findings before this Court." It is well-established, of course, that a Magistrate Judge makes only a recommendation to this court on a dispositive matter, 28 U.S.C. § 636(b)(1)(B). That recommendation has no presumptive weight, *Mathews v. Weber*, 423 U.S. 261 (1976). This court retains authority to accept, reject or modify the recommendation. *Id.* § 636(b)(1)(C). Had the court referred this matter to a Magistrate Judge, this court would, however, have been obligated to perform a de novo review only of those portions of the Report to which specific objection was made. In the present case, the court exercised de novo review as to all arguments advanced by Petitioner. Therefore, this court's consideration of Petitioner's claims was considerably more extensive than if a Report had been prepared. The court is hard pressed to understand how Petitioner can claim to have been denied due process by a procedure that afforded Petitioner enhanced consideration by this court.

Finally, as to the deadline imposed for filing the Rule 59(e) motion, the court's scheduling order complied with the provisions under Rule 59(e) requiring *filing* of the motion, not merely service, "no later than 10 days after entry of the judgment." Moreover, Petitioner failed to request an extension and, indeed, filed a Supplemental Memorandum on June 25, 1997, which the court considered. Therefore, Petitioner was not prejudiced.

CONCLUSION

Based on the foregoing, IT IS THEREFORE ORDERED that Petitioner's Motion to Alter or Amend the Judgment be partially granted and partially denied. It is GRANTED as to the modifications to the June 10, 1997, order on Ground 22, and DENIED in all other aspects.

IT IS FURTHER ORDERED that within fifteen (15) days of the filing date of this order Petitioner's counsel shall file a supplement to their pending CJA-30 voucher submitted in late April 1997. Counsel shall update their request for attorney's fees to include the balance of work performed in this court through the final judgment and Rule 59(e) motion.

IT IS SO ORDERED.

CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Florence, South Carolina
July __, 1997